

Chapter VII

FIELD INVESTIGATIONS: DISTRICT OFFICES

A. Overview of Function and Updated Data

Complaints and reports about California physicians which have passed through the screening process of the Central Complaint Unit are referred to MBC's district offices for investigation. MBC maintains eleven field offices ("district offices") staffed by peace officer investigators, supervising investigators, and medical consultants (physician employees). A complaint that warrants additional scrutiny after CCU screening is referred the district office in the geographical area where the subject physician practices. The case is assigned to an MBC investigator who — assisted by the medical consultant, supervising investigator, and sometimes an HQE attorney — reviews the existing file and conducts the investigation. This process includes the gathering of medical records or evidence; locating and interviewing complainants and other witnesses; interviewing the subject physician; and, in quality of care cases, securing review of the investigative report and the evidence by a physician "expert reviewer."

As reflected in Exhibit V-C above, in 2003–04, Medical Board investigators opened 1,887 investigations, closed 2,117 investigations, referred 580 matters to HQE for administrative enforcement action, and referred 37 cases for criminal action. In 2004–05, using new definitions of the terms "complaint" and "investigation,"¹³³ Medical Board investigators opened 1,443 investigations, closed 1,475 investigations, referred 521 matters to HQE for administrative enforcement action, and referred 34 cases for criminal action.

Business and Professions Code section 2319 requires MBC to establish a goal that "an average of no more than six months will elapse from the receipt of the complaint to the completion

¹³³ As a result of findings and recommendations in the *Initial Report*, MBC discontinued counting notices of intent to sue under Code of Civil Procedure section 364.1 and reports of malpractice payouts sent to the National Practitioner Data Bank as "complaints" and "investigations" in its 2003–04 enforcement data. *Initial Report*, *supra* note 13, at 97–100. Also in response to *Initial Report* recommendations, MBC has discontinued counting so-called "change of address citations" as either complaints or investigations in its 2004–05 data. *See supra* Chapter VI.B.1. Care should be exercised in comparing prior data (which included these categories) with 2004–05 data (which do not).

of the investigation.” Cases involving “complex medical or fraud issues or complex business or financial arrangements” should be investigated within one year.¹³⁴ As indicated in Exhibit VII-A below, in fiscal year 2004–05, the average timeframe for the completion of only the investigative portion of MBC case processing was 259 days, down slightly from the 2003–04 figure of 261 days.¹³⁵ These cycle times, while comparing favorably with even longer averages in the recent past (*e.g.*, 315 days in 1991), continue to call for vigorous action to improve investigative efficiency and speed, if there is to be any realistic chance of meeting MBC’s statutory goals.

Ex. VII-A. FY 2004–05 Investigation Timeframes By Disposition and Day Range

Day Range	Non-Legal Closure		Referred for Legal Action ¹		Total	
	Number	Percent	Number	Percent	Number	Percent
1 Month or Less	37	4.0%	145	26.8%	182	12.3%
1 to 3 Months	88	9.4%	41	7.6%	129	8.7%
3 to 6 Months	216	23.1%	72	13.3%	288	19.5%
6 to 9 Months	201	21.5%	53	9.8%	254	17.2%
9 to 12 Months	173	18.5%	61	11.3%	234	15.9%
12 to 18 Months	165	17.7%	109	20.1%	274	18.6%
18 to 24 Months	41	4.4%	40	7.4%	81	5.5%
More than 24 Months	13	1.4%	21	3.9%	34	2.3%
Total	934	100.0%	542	100.0%	1,476	100.0%
Average Timeframe	264 Days		251 Days		259 Days	

¹ Includes both AGO and DA referrals. Dual referred cases are counted once.

Source: Medical Board of California

B. The Monitor’s Findings and MBC/Legislative Responses

The following summarizes the Monitor’s *Initial Report* findings and concerns about MBC’s investigative process, and documents the responses to those findings implemented by the Medical Board, the Attorney General’s Office, and the Legislature. More detail on each of the findings is available in Chapter VII of the *Initial Report*.¹³⁶

1. MBC investigations are plagued by delays and excessive case cycle times.

The Medical Board has consistently failed to comply with the statutory goals set by the Legislature for the investigative process, including an average of six months total time from receipt of complaints to completion of investigations (one year for complex matters). As noted above, the

¹³⁴ Bus. & Prof. Code § 2319(a) and (b).

¹³⁵ *Initial Report*, *supra* note 13, at 125.

¹³⁶ *Id.* at 125–48.

average elapsed time for an MBC investigation in FY 2004–05 was 259 days, up from a similarly-calculated 243 days in 2002–03, and down slightly from the 2003–04 figure of 261 days. Over 26% of MBC investigations still take an average of twelve months or more. Chapter VII of the *Initial Report* documented the multiple personnel and process issues contributing to these long cycle times, including the general difficulty of MBC cases; reductions in district office staff; losses of other valuable resources (such as medical consultant time); investigator recruitment and retention challenges; a changed case mix toward greater complexity; and increased defense counsel use by physicians. Many of these factors are outside the control of district office staff, and most will not change significantly until the resource and procedural changes of SB 231 (Figueroa) take full effect.

MBC’s cadre of investigators are competent and dedicated, and they are doing a good job of maintaining the volume and quality of casework despite challenges. However, even with MBC investigator caseloads at a near-record low of 19 cases per investigator,¹³⁷ MBC remains unable to comply with the six-month and one-year processing goals. Despite a commitment to improvement here, MBC still suffers from investigations that take too long.

As described in the *Initial Report*, MBC investigations are characterized by a “hurry up and wait” phenomenon. Although some progress has been made as the result of MBC internal process improvements during 2004–05, investigators must still wait an average of 44 days to get complete medical records (even after CCU has already spent 66 days in the same effort); then wait for the medical consultant to assist with records analysis; then wait for the subject to agree to be interviewed (an average of 57 days in 2004–05); then wait for the medical consultant’s memo and identification of the essential expert reviewer; and then wait for the expert review (an average of 69 days — more than twice MBC’s goal of 30 days).

The Monitor’s *Initial Report* recommendations called on the Medical Board to address both resource/structural problems and process weaknesses in order to significantly reduce the stubbornly long case cycle times in MBC investigations. The Medical Board considered and adopted nearly all of those recommendations at its 2005 meetings, and the Board and its staff have diligently worked to implement the internal changes and support the legislative efforts described throughout this report. As described below, the internal reforms already undertaken by MBC are beginning to bear fruit. Coupling these efforts with the even greater changes to be wrought by SB 231 — most notably the 30% increase in fee revenues and the advent of the vertical prosecution system of case processing, there is reason for optimism that case processing will be speeded. But there is still much to be done before MBC case delays are reduced to the levels set by statute.

¹³⁷ Medical Board of California, *2004–05 Annual Report* (Oct. 1, 2005) at vi.

2. Attorney/investigator coordination and teamwork is inadequate.

Notwithstanding dedicated work by MBC and HQE staff, the current system linking MBC investigators and HQE prosecutors continues to suffer from inadequate coordination and teamwork, and will do so until the new and more modern vertical prosecution system is fully implemented as mandated by SB 231 (Figueroa).

As documented in the *Initial Report*,¹³⁸ MBC investigators in the present system typically function without true, close coordination with the trial prosecutor who will ultimately handle the case. Despite the existing Deputy in District Office (DIDO) program,¹³⁹ most MBC investigators still receive only limited legal support, rarely work directly with the trial counsel during the critical formative phases of the case, and seldom play a significant role in the pre-hearing and hearing process to which their work is directed. This system of limited investigator/trial attorney teamwork and cooperation — the “hand-off prosecution model” — stands in sharp contrast to the “vertical prosecution model” (where investigators and attorneys work together as a team throughout the life of a case) widely used in complex white collar crime and regulatory matters by many state, federal, and local agencies. In Recommendations #22 and #33, the Monitor suggested that MBC and HQE convert to the vertical prosecution model.

The implementation of a contemporary vertical prosecution system — bringing MBC investigators and HQE prosecutors together into investigation and trial teams — is a centerpiece of SB 231 (Figueroa).¹⁴⁰ If fully and successfully implemented, SB 231 will work a comprehensive change in the entire process through which MBC and HQE develop and resolve disciplinary cases.

Specifically, SB 231 adds new section 12529.6 to the Government Code, which makes legislative findings that because of the critical importance of MBC’s enforcement function, “using a vertical prosecution model . . . is in the best interests of the people of California.” This new section implements the fundamental reform needed to begin vertical prosecution by mandating the use of teams of investigators and prosecutors who are brought together early in each case and remain together throughout the life of the case. Section 12529.6(b) requires that, as of January 1, 2006, each MBC complaint that is referred for investigation be “simultaneously and jointly” referred to an investigator/prosecutor team (including the prosecutor who will ultimately file and try the case) which will handle the matter for its duration. Under the direction of the prosecutor, the investigator will gather evidence that enables the prosecutor to advise MBC regarding the disciplinary proceeding and whether to take legal action.

¹³⁸ *Initial Report*, *supra* note 13, at 129–40.

¹³⁹ *See id.* at 131–34 for a description of the DIDO program.

¹⁴⁰ SB 231 (Figueroa), 2005 Cal. Stat. 674, §§ 24–28.

As described more fully in Chapter IV above, SB 231 provides for fully integrated implementation of vertical prosecution (including funding for the transfer of MBC investigators to the Department of Justice), but only after an initial 18-month experience with this system has been evaluated.¹⁴¹ SB 231 adds new Government Code section 12529.7 which requires the Medical Board — in consultation with the Department of Justice, the Department of Consumer Affairs, the Department of Finance, and the Department of Personnel Administration — to report and make recommendations to the Legislature by July 1, 2007 on the vertical prosecution model as created in Government Code section 12529.6. (All of the newly added provisions relating to vertical prosecution sunset on July 1, 2008, unless affirmatively acted upon by the Legislature.) Thus, in the latter half of 2007, the Legislature will evaluate the merits of the new system and will determine its future. MBC and HQE have 18 months to demonstrate the effectiveness of the team approach in order to earn full structural implementation of the system, including the transfer of MBC investigators to the Department of Justice.

SB 231 prepares MBC and HQE for fully integrated implementation of vertical prosecution through several provisions. Specifically, SB 231 (1) amends Government Code section 12529(a) to transfer the investigative function to HQE; (2) adds new section 2006 to the Business and Professions Code to redefine “MBC investigations” as “HQE investigations”; (3) amends Government Code section 12529.5(b) to eliminate the DIDO program under which HQE has been required to place prosecutors onsite at MBC district offices to provide legal guidance to investigators — this program will be unnecessary when MBC investigators are transferred to HQE; and (4) adds new section 2435.3 to the Business and Professions Code section to authorize MBC to increase its licensing fees to cover the costs associated with transfer of its investigators to HQE.

In anticipation of the January 1, 2006 start of the vertical prosecution system, MBC and HQE officials have met and begun to comprehensively plan its implementation. The Monitor’s recommendations for implementing vertical prosecution, and the plans and efforts already made by MBC and HQE, are detailed in Chapter VII.C below. As more fully described there, the Monitor urges MBC and HQE to make full use of their opportunity to prove the value of the team approach. By doing so, they will earn the full and final implementation of this advantageous system of investigation and prosecution.

¹⁴¹ As described in Chapter IV.A above, the full implementation of the vertical prosecution system, including a prompt transfer of MBC’s investigators and their supervisors to HQE, was ultimately supported by MBC, HQE, organized medicine, and a wide range of stakeholders and experts, without significant opposition. However, the Schwarzenegger administration opposed the transfer, and the final version of the bill provides for the multi-stage process described here.

3. Delays in medical records procurement are chronic.

The lengthy waiting time for the procurement of essential medical records has been among the greatest problems facing MBC's district offices and among the principal sources of overall case processing delays. In fiscal year 2003–04, the average timeframe from a request for records by MBC investigators to the receipt of all records was 74 days (or 2.5 months), despite the statutory 15-day timeframe in Business and Professions Code sections 2225 and 2225.5. Combining the district offices' 74-day average with CCU's average 66-day records-gathering period, medical records procurement at MBC during 2003–04 consumed an average of 140 days — or 77% of the 180-day goal in section 2319. These daunting statistics were in part the result of both MBC investigators and HQE prosecutors demonstrating apparent tolerance for physicians' lengthy delays in complying with medical records requests. MBC requests for HQE assistance in obtaining these records were comparatively infrequent, and actual enforcement actions were even less frequent.¹⁴² In Recommendations #7, #23, and #34, the Monitor urged MBC and HQE to agree upon, implement, and strictly enforce a new medical records procurement policy.

In response, MBC management amended *Enforcement Operations Manual* section 6.14 in January 2005 to advise all sworn staff that a “zero tolerance” policy has been initiated and that Board staff will no longer tolerate delays by physicians or hospitals in producing medical records requested pursuant to Business and Professions Code section 2225.5. This section of the manual advises investigators of their responsibility to obtain authorization for release of a patient's medical records within 30 days of case assignment and to serve the release to the appropriate facility within 10 days. A new cover letter which accompanies the release advises the physician, hospital, or other facility of the civil penalties applicable for failure to produce the records in the allotted time.

To ensure that physicians and institutions clearly understand the nature of the request and the time interval imposed by law, a procedural change was instituted requiring that these letters not be sent by mail or fax. Instead, the new policy requires a Board investigator or investigative assistant to serve the letter and medical release in person. The Board representative must complete a declaration of service confirming the date, location, and person who received the request, as this information is required if civil penalties for noncompliance are sought. MBC investigators report that in-person service of the letters and releases has improved understanding and cooperation with certain facilities and their representatives.

MBC staff also instituted a tracking system so that each investigator can readily monitor the dates for pending records requests. Within one day of an overdue request, the investigator must contact the physician/facility to inquire about the records and to advise of potential penalties which

¹⁴² *Initial Report*, *supra* note 13, at 140–41.

may accrue on the specified due date. This contact also serves to determine whether the physician or facility is experiencing any “good cause” delays. MBC supervisors and HQE staff must review such explanations to evaluate their sufficiency.

MBC has taken steps to publicize its vigorous new policy on records procurement. The Board published an article in the January 2005 issue of its *Action Report* newsletter advising the medical community of this change in policy. In March 2005, HQE management sent letters to defense counsel and various professional organizations advising them of the Board’s change in requiring adherence to sections 2225 and 2225.5.

As a direct result of the Medical Board and its staff committing to internal process improvements, MBC’s fiscal year 2004–05 statistics show encouraging signs of reduction in medical records procurement delays. During 2004–05, the average timeframe from a request for patient records by an MBC investigator to the receipt of those records was 44 days, down from 74 days in 2003–04 (a reduction of over 40%). This is a significant improvement, in both nominal and percentage terms, and MBC investigators and supervisors should be commended. However, despite this substantial improvement, the average timeframe is still more than twice the allowable statutory time period, so further reductions are important.

SB 231 (Figueroa) will assist in medical records procurement by improving the tools available to ensure prompt physician and institutional responses to record requests. The bill amends section 2225(d) to define the term “good cause” for delay and to extend the time within which physicians must produce requested medical records to 15 business days from the date of MBC’s request.¹⁴³ Thereafter, SB 231 authorizes MBC to use its existing citation and fine authority¹⁴⁴ to penalize physicians immediately when they fail to produce requested medical records within 15 business days and without good cause. SB 231 specifies that the citation and fine remedy is in addition to other remedies available to MBC (including subpoenas and subpoena enforcement proceedings, certain warrantless searches, and the use of administration inspection warrants under Code of Civil Procedure section 1822.50 in appropriate cases).

Past delays in medical records procurement have been attributed in part to reliance on the subpoena enforcement process as the principal remedy for noncompliance. This process typically requires attorney and sometimes superior court involvement, and thus entails a considerable

¹⁴³ Section 13 of SB 231(Figueroa) amends Business and Professions Code section 2225(d) to define “good cause” justification for a physician’s failure to turn over medical records, including but not limited to “physical inability to access the records in the time allowed due to illness or travel,” and extends the time for production of records from “15 days” to “15 business days.”

¹⁴⁴ See Bus. & Prof. Code § 125.9.

investment of time and resources. As documented in the *Initial Report*, MBC investigators found that “jawboning” respondents was easier than the process of requesting and obtaining subpoenas and then enforcing them.¹⁴⁵ SB 231’s new authority to use the citation and fine process gives MBC staff a first enforcement option that is fast and simple to use, leaving the more elaborate subpoena enforcement process for more serious or complex matters. Cite-and-fine will become an important tool for an immediate and measured response to physician or institution delays.

Delays in investigator procurement of medical records have been significantly reduced and further real progress is within reach with the new policies and tools at hand. However, MBC investigators (and their HQE teammates) must ensure those reductions by institutionalizing the new organizational value: *Unexcused delays in producing medical records will not be tolerated.*

4. Subject interview policies are inconsistent and ineffective.

Medical Board investigators must conduct subject interviews as a key part of the district office investigative process. In the *Initial Report*, the Monitor found that the delay inherent in this interview process — in 2003–04, an average 60-day delay between MBC’s request for an interview and the physician’s appearance or refusal to appear¹⁴⁶ — contributed to the overall 259-day average investigative timeframe. Interview delays reflected, in part, an inconsistency among district offices regarding the process of arranging and conducting the interviews. Some investigators relied on persuasion to obtain physician interviews; others pursued stricter policies utilizing subpoenas for attendance and tape-recording. The more permissive policy of informal persuasion, voluntary requests, and waiting for cooperation contributed significantly to the problem of excessive case cycle times. The vigorous use of the administrative subpoena authority, after a reasonable interval for cooperation, worked well in certain district offices and was the subject of Recommendation #24 by the Monitor in the *Initial Report*, which stressed the importance of clarified authority, consistent policies of requiring prompt physician cooperation, and regular tape-recording of interviews.

MBC management took prompt steps to implement these policy change recommendations. In January 2005, enforcement staff revised *Enforcement Operations Manual* section 6.2 to advise all investigators of a change in the policy governing the scheduling of physician interviews. MBC investigators are now directed to contact the physician to request an interview and give the physician 72 hours to respond with a date for the interview, which date must be within the next 15 calendar days. If the physician fails to respond within 72 hours or fails to appear at the scheduled appointment, the investigator must prepare an investigational subpoena to appear and testify. In addition, section 6.2 now specifies that all physician interviews should be tape-recorded. If the

¹⁴⁵ *Initial Report*, *supra* note 13, at 140–41.

¹⁴⁶ *Id.* at 141–43.

physician arrives at the interview and refuses to proceed because of the tape recording, the physician is advised that subpoena enforcement action will be instituted by the Office of the Attorney General.

In a January 2005 article in the *Action Report*, MBC publicized these new interview policies for the medical community; in March 2005, HQE management sent letters to defense counsel and professional organizations advising of the policy changes.

MBC management reports initial resistance among some physicians and their counsel regarding these changes. But MBC supervisors have discussed with field investigators the appropriate handling of unusual circumstances, and this has apparently improved the level of understanding between Board staff and physicians and their attorneys. MBC indicates that there has not been a need to request a subpoena enforcement action by HQE since the announcement of the new policies in early 2005. Implementation of these new policies has somewhat reduced the interview delay: In 2004–05, the average time between initial request and actual subject interview was 57 days; the average time between request and interview refusal was 49 days. These figures are down slightly from the overall average of 60 days in 2003–04. However, they still represent a large portion of the undesirable 259-day average investigative timeframe.

5. Medical consultant availability, training, and utilization are inadequate.

In the *Initial Report*, the Monitor noted that the medical consultant's (MC) function is central to the speed and quality of QC case processing at the district office level; however, problems regarding medical consultant availability, training, and proper use contribute significantly to lengthy investigations and inefficient operations.¹⁴⁷ Specifically, budget constraints caused a 15% reduction in available medical consultant hours agencywide during 2003–04, and this shortfall has not yet been corrected. Shortages of medical consultant time have made it continuously difficult for investigators to obtain sufficient medical consultant assistance, exacerbating a situation of reduced investigative and support staff, and requiring unproductive down time in cases waiting for consultant attention. In particular, these reductions have often meant that medical consultants are unavailable for or are greatly delayed in reviewing expert opinions and participating in the decision to transmit cases. In Recommendation #28, the Monitor urged MBC to expand and improve its medical consultant program.

As described in Chapter IV, SB 231 (Figueroa) increases initial and biennial renewal fees by 30%. MBC management staff plans to use some of these additional funds to increase medical consultant hours. The Monitor concurs that budgets in 2006 and thereafter must restore the 15% cut imposed during 2003–04; if possible, the medical consultant budget should be increased beyond that

¹⁴⁷ *Id.* at 144–45.

level, because the marginal benefit of small increases in MC funding is likely to be very high in reducing district office investigative delays.

6. Expert witness availability and use are systemic weaknesses.

In the *Initial Report*, the Monitor found that MBC investigations continue to be delayed by the unavailability of experts (particularly highly specialized ones), inadequate training provided to new experts, and inconsistent performance by experts. These concerns are addressed in detail in Chapter VIII below.

7. Ongoing training of investigators, medical consultants, and experts is inadequate.

During recent years, MBC — which in the past had an exemplary training program — was forced to substantially reduce formal training for investigators, medical consultants, experts, and others, to accommodate pressing budgetary concerns. If MBC is to significantly improve its case cycle times and efficiency, a systematic and professionalized training program for its field investigators, medical consultants, and expert reviewers is required. For this reason, the Monitor's Recommendation #27 suggested that MBC reinstate and improve its sequential training programs for which the agency was justifiably recognized in previous years, and extend its efforts to coordinate training with other agencies.

MBC management has maintained and modestly expanded its training regimen in 2004–05, to the extent consistent with the limited existing funding. Training courses, most of which are POST-certified, have been offered in areas such as new MBC investigator training (72 hours); drug awareness recognition (8 hours); interviews and interrogation (8 hours); probation investigator training (26 hours); pain management issues (6 hours); SB 151–CURES electronic prescribing (2 hours); Proposition 115 preliminary hearing testimony (2 hours); and others. In addition to formal certified training courses, supervising investigators have provided on-the-job training to investigators, and field training officer materials have been developed for assistance in training new sworn staff. POST training videos are also used to supplement training classes with in-person presenters.

However, full implementation of the Monitor's training recommendations will require funds from the SB 231 budget augmentation. Especially worthy of consideration is the reinstatement of the senior-level training supervisor position which was a casualty of the 2001–04 budget cuts.

8. Coordination with state and local prosecutors is underutilized.

Many of MBC's peace officer investigators have substantial knowledge of the criminal and civil law enforcement options available to the agency as potential tools to address complaints against

medical practitioners involving both quality of care and physician conduct issues. However, the *Initial Report* noted the concerns of state and local prosecutors over the need for greater early communication and consistent coordination between MBC investigators and state and local law enforcement agencies in cases where non-administrative enforcement tools (such as Penal Code section 23 orders or civil unfair competition actions) may be appropriate.¹⁴⁸ In Recommendation #25, the Monitor suggested that MBC make every effort to improve cooperation and case referrals between its enforcement staff and state and local prosecutors.

MBC management and staff have taken to heart the Monitor's recommendation that it improve communication and coordination with state and local criminal and civil prosecutors, including district attorneys, city attorneys, and deputies attorney general in non-HQE sections. MBC staff now regularly participates in the bi-monthly consumer protection roundtable meetings conducted by the California District Attorneys Association (CDAA) Consumer Protection Committee in both southern and northern California. In May 2005, MBC Enforcement Chief Jerzak gave a well-received presentation to a plenary session of the CDAA Consumer Protection Prosecution Conference in Santa Barbara, the largest annual gathering of state and local economic and regulatory crime officials in California. Chief Jerzak's presentation focused on cases which typically lead to criminal referrals to local prosecutors, with emphasis on Penal Code section 23 filings, unlicensed practice of medicine, pain management, medical marijuana, Internet prescribing, and sexual misconduct cases.

In addition to its significant new relationship with CDAA, during 2004–05 the Medical Board reached out to other allied investigative and prosecution agencies in a wide variety of settings. MBC representatives participated in the November 2004 training conference sponsored by California Narcotics Officers' Association; Drug Enforcement Agency (DEA) and U.S. Justice Department investigator training on pain management issues; and monthly meetings with regional Drug Diversion Task Forces, the Professional Diversion Information Network, the FBI Healthcare Fraud Task Force, the Medical/Legal Fraud Task Force associated with the U.S. Department of Health and Human Services, the RxNet Task Force associated with the California Department of Insurance, DEA, and the Bureau of Narcotics Enforcement, and local police departments, among others. Chief Jerzak has also met with and begun initiatives with the California Department of Corrections and the California State Coroners' Association.

Also during 2004–05, MBC investigative staff worked on a number of significant interagency enforcement cases, including cases involving the Orange County and San Diego County District Attorneys' Fraud Task Force; a DEA and U.S. Attorney case yielding \$545,000 in asset forfeiture; a U.S. Food and Drug Administration (FDA) criminal investigation involving Botox and non-FDA

¹⁴⁸ *Id.* at 146–47.

approved drugs; and several major cases worked in conjunction with county coroners and sheriff's departments involving drugs, sex crimes, and fatalities.

In March 2005, MBC sent more than 500 letters to law enforcement administrators, police departments, sheriff's departments, county district attorneys, U.S. attorneys, and state law enforcement agencies. These letters provided information about MBC's increased commitment to interagency cooperation in appropriate cases.

These outreach efforts have increased interagency contacts. An informal survey by MBC management shows that, during 2004–05, a wide range of local, state, and federal law enforcement agencies made requests for information and education from Medical Board staff to share specialized expertise in areas such as pain management, medical marijuana, Internet prescribing, prescription drugs, corporate practice of medicine, unlicensed practice of medicine, and sexual misconduct.

The Medical Board's efforts to implement the Monitor's recommendation regarding relationships with other agencies — undertaken during a year when many other challenges were being addressed — are highly commendable. The Monitor notes a genuine MBC management commitment to these efforts, and a significant improvement in interagency communications and coordination between MBC investigators and state and local prosecutors. However, special attention to early case contacts with civil and criminal prosecutors — especially district attorneys, city attorneys, and relevant sections of the Attorney General's Office — is needed to ensure that the full benefits of teamwork and coordination of efforts are realized. The building of these vital relationships is not a one-time activity, but an ongoing process which requires a clear and continuing message from Medical Board management that MBC is a steadfast teammate and partner with all its sister agencies.

9. Recruitment and retention problems exacerbate MBC personnel shortages.

The dramatic losses in investigative personnel suffered by MBC during the 2001–04 hiring freeze and budget crisis have not yet been restored, despite the Medical Board's repeated requests for hiring authority through the budget change proposal (BCP) process. At this time (and prior to any additional resources from the SB 231 fee increase), the Medical Board investigative staff remains 19 sworn investigators (or almost 20%) short of its 2001 staffing level. In addition, recruitment and retention problems continue to plague personnel management at MBC. Highly trained and valuable investigators continue to be lost and well-qualified applicants go elsewhere because of disparities between investigative salaries at MBC and those at other agencies hiring peace officers. In Recommendation #26, the Monitor urged MBC to continue efforts to reinstate lost enforcement program positions.

The fee increase in SB 231 (Figueroa) satisfies the essential pre-condition for the restoration of these necessary MBC investigator positions. MBC management has projected the replacement of these lost investigator positions as one of the first uses of the 30% increase in fees. These investigators are also central to the successful implementation of the vertical prosecution system, which state law now declares to be in the best interests of the public.¹⁴⁹ However, the Medical Board cannot return to this minimally necessary staffing level without the cooperation of the Department of Consumer Affairs, the State and Consumer Services Agency, and the Department of Finance, which must ultimately approve budgets or BCPs for the hiring of MBC staff and the reinstatement of lost positions.

Any realistic hope of meeting the state's longstanding statutory goals for MBC disciplinary investigations hinges on an improved HQE/MBC team process and on the personnel necessary to make that process work. The Medical Board, the organized medical community, health maintenance organizations, consumer advocates, law enforcement, the Legislature, and virtually all other stakeholders supported the fee increase in SB 231 as a means of supplying the funds to improve the Medical Board's enforcement program without using any general fund monies. The proposal to restore MBC investigator positions represents not a net growth in state government but a return to the 2001 level of staffing previously found to be essential. The Monitor urges all those with authority over the budget process to permit the Medical Board to use these earmarked special funds for the purposes for which they are intended, including the restoration of the MBC investigative positions lost in recent years.

The related problems of investigator recruitment and retention, discussed in detail in the *Initial Report*,¹⁵⁰ can ultimately be addressed by full implementation of the integrated vertical prosecution system envisioned in SB 231. Upon a showing of the success of the vertical prosecution system, and with the Legislature's affirmative approval after review of the 2007 report, the transfer of the MBC investigators to the Health Quality Enforcement Section will eventually result in special agent status for MBC's sworn personnel and a concomitant increase in pay and career recognition. Morale and productivity will be boosted, and MBC's ability to recruit and retain highly qualified investigators will be dramatically improved. The Monitor fully expects that the results of the initial vertical prosecution effort will justify this important improvement in the Medical Board's human resources.

10. Procedural and training manuals must be updated continuously.

The *Initial Report* expressed concern that MBC investigations and other enforcement processes were frequently guided by policy and procedure manuals that had not been consistently

¹⁴⁹ Bus. & Prof. Code § 12529.6(a), added by SB 231 (Figueroa), 2005 Cal. Stat. 674, § 28.

¹⁵⁰ *Initial Report*, *supra* note 13, at 147–48.

reviewed or approved by HQE — MBC’s legal counsel and enforcement partner.¹⁵¹ In addition, at least some of those manuals had not been adequately updated by MBC management and were, in at least a few cases, inaccurate as to Board policy.

The Monitor is pleased to report material progress in addressing this concern. As described in Chapter V of this report, the *Enforcement Operations Manual* has been substantially updated in a series of efforts during this reporting period, as have other manuals and guides essential to the activities of the MBC investigators.¹⁵² Of equal significance, copies of the *Enforcement Operations Manual* have now been shared with HQE management and supervisors for the first time in at least a decade, permitting an ongoing dialogue on enforcement policies and guidelines.

This latter event is the beginning of the next phase in the development of a new operations manual reflecting the fundamental changes in HQE/MBC teamwork brought about by SB 231. As discussed in Chapter V and below, development of a single operations manual guiding the joint investigation and prosecution of MBC disciplinary matters is an essential step toward successful implementation of the vertical prosecution system to be used starting January 1, 2006.

11. Investigators need full and easy access to law enforcement databases.

The *Initial Report* noted that MBC investigators sometimes lack convenient access to law enforcement databases that are essential to modern police work. Budgetary limitations reportedly prevent investigators from easier access to these law enforcement systems, and from using commercial databases, such as Merlin, Westlaw/Dialog, and similar systems, which investigators in other California agencies are funded and permitted to use. In Recommendation #29, the Monitor suggested that MBC improve investigator access to law enforcement information systems.

In response to this recommendation, MBC managers have obtained cost estimates to determine whether enhancements to current information systems are feasible. For example, access to the “DMV Direct” system would allow for DMV data to be available via each investigator’s computer terminal. Currently, DMV data are available to MBC enforcement staff only via three California Law Enforcement Telecommunications System (CLETS) terminals located in Sacramento, Rancho Cucamonga, and Cerritos. Board staff trained on the CLETS system and its rules respond to requests for these data, but the turnaround time is often 48 hours and sometimes

¹⁵¹ *Id.* at 148.

¹⁵² See *supra* Ch.V.A.3. One of MBC’s revisions to its *Enforcement Operations Manual* responded to Monitor’s Recommendation #20, which found that MBC’s various procedure manuals were inconsistent on the issue of whether and when physicians who are the subject of complaints should be notified that those complaints have been closed. In late 2004, MBC amended sections 7.1, 8.7, and 9.1 of the EOM to require CCU and its district offices to notify any physician who has been contacted by CCU or field staff during complaint processing of the closure of that complaint.

longer. This two-day lag time disrupts the continuity of new investigations; MBC investigators should have more convenient and immediate access to this information.

MBC management reports that a link via the existing Teale Data Network lines would allow for DMV information to be available to each investigator at a cost of \$1 per month per investigator (or an annual cost of \$920 to MBC). MBC plans to implement this system for DMV data access right away. The Monitor views this as just one of several small investments in information systems which would, in the aggregate, significantly improve district office performance.

In interviews with the Monitor, MBC investigators requested that CLETS terminals be made available in every MBC office (currently eleven district offices and three probation offices). CLETS terminals are leased, and the costs for installation and for monthly use are relatively modest — estimated at about \$30,000 for installation of eleven new terminals, and total agencywide operating costs of about \$14,000 per year. This would be another wise use of a small part of the SB 231 revenue increase, and the Monitor unequivocally endorses it and similar information system improvements.

In addition, MBC management is now exploring the feasibility of access to private commercial data systems, including Lexis/Nexis and Pro E Access, which systems are useful for individual and business background information of all kinds. Presently, MBC management is inclined to implement the Pro E Access system (which provides person/business searches at \$5 per search) if ready access to HQE's Lexis/Nexis account cannot be conveniently arranged.

The Monitor notes that some of these information system efforts and expenditures will become unnecessary following the proposed transfer of MBC investigators to HQE, where access to these systems is more readily available. This is one of the numerous efficiencies which would be realized by full integration of the MBC investigators and HQE prosecutors.

C. Recommendations for the Future

Introduction. The enactment of SB 231 (Figueroa) signals the start of a new era for the Medical Board enforcement program generally, and for the MBC investigative process in particular. A fundamental paradigm shift is envisioned by the Legislature, which concluded that because of the critical health and safety importance of MBC's enforcement function, "using a vertical prosecution model . . . is in the best interests of the people of California."¹⁵³ As of January 1, 2006, the era of arm's-length working relationships and "hand-off" investigations is giving way to the vertical prosecution model, in which the MBC investigator and HQE prosecutor work together as a team throughout the life of a case.

¹⁵³ Bus. & Prof. Code § 12529.6(a), added by SB 231 (Figueroa), 2005 Cal. Stat. 674, § 28.

As discussed in Chapter IV above, the Monitor, Senator Figueroa, and MBC and HQE management originally proposed in SB 231 that vertical prosecution be implemented in a fully integrated manner, with the transfer of MBC's peace officer investigators and supervisors to HQE to best facilitate the operation of a single system with closely-knit case teams. This version of the bill was consistent with Monitor's Recommendation #22, which stated: "The Monitor believes the vertical prosecution system could best be implemented by merging existing MBC investigators and supervisors into HQE."¹⁵⁴ The final version of the bill provides instead for multi-stage implementation, including an initial period of joint case assignments and supervision, followed by a July 2007 report and subsequent evaluation. The mechanism and funding for the transfer are present in the law but await the Legislature's affirmative evaluation of the initial phase.

While immediate integration would have improved the efficiency of the vertical prosecution system, the Monitor is convinced that the teamwork model will readily prove superior to the hand-off model and will be affirmed by the Legislature in its 2007 review. What remains in the immediate future is a full commitment to the new model by both MBC and HQE, which in turn will earn the full integration of the staffs as originally envisioned.

Keys to the long-term success of the vertical prosecution system. Vertical prosecution is a new paradigm for the MBC investigative process and the disciplinary system as a whole. The traditional model of separate investigation and hand-off is now replaced with a more appropriate model of partnership and teamwork throughout the life of each case. Given the fundamental nature of this change, success in implementing vertical prosecution will involve more than new case assignments and new names for old activities — it will in fact require significant changes to the organizational cultures of both MBC and HQE.

Based on other agencies' experiences with vertical prosecution, full implementation should take place in three dimensions: *structural*, *operational*, and *attitudinal*.

■ ***The structural dimension of vertical prosecution.*** To be successful with this new system, MBC and HQE should oversee significant changes in the structure and resources of their agencies, including:

(1) *Sufficient staff and financial resources* must be allocated to operate the new system of case teams and supervisors. A vertical system without enough staff is just as likely to fail as any other understaffed work process.

¹⁵⁴ *Initial Report*, *supra* note 13, at 149.

(2) *A logical and workable system of case assignments* for the new case teams must be devised and installed, with sufficient flexibility to adapt to differing case needs and staffing circumstances.

(3) *Design and implementation of an appropriate supervisory structure* to provide sufficient management and supervision for peace officer investigators and attorneys now working together in a single system. Any such system must clarify the supervisory chain of command, so that no team member is uncertain who to look to for guidance and decisions.

(4) *Short- and long-term decisions on physical plant and equipment* must be made so as to guide the resolution of logistical issues. Included here must be decisions on office space to house the respective staffs (bearing in mind long-term lease commitments and related issues) and short- and long-term questions about shared equipment and information systems (such as management information systems, information database systems, computer and communications systems, and others).

(5) *Decisions on long-term structural reform, including potential staff transfer*, must ultimately be made to guide the permanent implementation of vertical prosecution. The Monitor believes that full integration of attorney and investigator personnel is optimal, and a primary goal of the initial phase of implementation should be to demonstrate the viability of the team system and the added value of full integration.

■ ***The operational dimension of vertical prosecution.*** The successful changeover to the vertical prosecution model calls for many operational and process changes:

(1) *Joint and mutual agreement on goals and operational procedures* — including a system of management cooperation and coordination of decisionmaking — must take place at the outset of this process.

(2) *Consistent, but flexible, application of the new teamwork system* must be planned and put in place, including new protocols and policies for case assignments, supervision of the two types of staff, team communications, travel and joint work issues, and resolution of disputes.

(3) *A jointly developed operations manual and other training materials* must be drafted and distributed in order to bring about the unification of two previously separate processes.

(4) *Joint (and separate) retraining for existing staff and training for new personnel* will be necessary for the long-term development of a unified casework process.

(5) *Coordination of management information systems* into a single unified system is essential to effective case management and staff supervision.

(6) *Standards of evaluation and mechanisms for course correction* must be developed as early as possible to enable managers to identify problems, fine-tune and improve the new process, and prepare to defend the system in subsequent evaluations.

■ ***The attitudinal dimension of vertical prosecution.*** No work process succeeds if the managers and employees do not believe in it and support it. MBC and HQE management and employees should bring a constructive and committed attitude to the vertical prosecution system, and should come to believe — as so many other professionals have learned — that being a valued and respected member of a successful team is the surest path to job satisfaction. This aspect of the proposed change should include:

(1) *Management commitment to the full and successful implementation of vertical prosecution* is the first requisite for a successful transition to the new system. Leadership in this context requires developing and sharing the new strategic vision for these organizations, and demonstrating that management is entirely committed to the successful change to vertical prosecution.

(2) *Staff commitment to the full and successful implementation of vertical prosecution* is equally important to this change. Staff commitment begins with seeing management's commitment, but also requires an understanding of the new process and how it will benefit everyone. MBC investigators and HQE attorneys must understand how the new teamwork system will improve their daily work lives, their careers, and their personal satisfaction.

(3) *Working relationships built on mutual respect, professionalism, and courtesy* are essential to successful teams of any kind. Law enforcement teams are no different. In the vertical prosecution system, there must be a consistent respect for the importance of the professional contributions of both attorneys and investigators, and the value of having both available in all stages of the case. The differing professional roles of members of the State Bar and peace officers can and must be preserved, but an environment of mutual consideration, professionalism, and courtesy must be fostered.

(4) *The teamwork ethos must replace the old attorney/client ethos* if vertical prosecution is to succeed. Understanding the advantages and satisfactions of teamwork is key, as is understanding that individual success is dependent on team success.

Ultimately, teamwork in a vertical prosecution system is, more than anything else, an *attitude* — an individual and collective commitment to mutual goals and an agreed-upon system to achieve

them. The vertical prosecution system has proven consistently successful at other agencies with similar regulatory duties. But it is a system which requires its participants to be committed to the team concept and the team's goals — and this means commitment to treating all colleagues as valued teammates, not as clients, subordinates, or outsiders.

Issues for the successful implementation of vertical prosecution. In light of these three dimensions of change, the Monitor recommends that MBC and HQE address the following issues to facilitate the successful transition to vertical prosecution. The Monitor notes that these recommendations are suggestions based on the experiences of other agencies in operating vertical prosecution programs. These concepts can and should be modified appropriately to meet the unique circumstances of implementation in this context. The Monitor's recommendations include:

■ ***Management coordination and planning for the implementation of SB 231.*** MBC and HQE management must meet together continuously during the period preceding January 1, 2006 to plan and coordinate the implementation of the new system. The blending of two different institutions into a single process is a complex task with all the stresses and strains inherent in any profound organizational change. MBC and HQE managers are, as a group, unusually dedicated and experienced public servants, but negotiating and implementing such changes are daunting tasks. Consideration might be given to the use of a third-party facilitator, ideally with consulting experience in managing organizational change, to assist in this transitional period.

MBC and HQE management are already well on their way to accomplishing this task. Discussions between HQE Senior Assistant Attorney General (SAAG) Carlos Ramirez and MBC Executive Director Dave Thornton, and other senior managers of both agencies, during September and October of 2005 resulted in a preliminary plan to implement the new vertical prosecution system, as mandated by SB 231, beginning January 1, 2006.

■ ***Installation of the basic system of case teams.*** MBC and HQE managers must devise and install the new system of required simultaneous and joint assignments of MBC investigators and HQE prosecutors to the new case teams. (As indicated in the *Initial Report*,¹⁵⁵ in most circumstances these teams would be formed around individual cases, and thus most investigators and attorneys would work with a number of different colleagues on different teams.) HQE and MBC should agree on the role of attorney and investigator supervisors, advice/consultation attorneys, and others in the new vertical system.

Successful implementation of vertical prosecution will require immediate efforts to acquire the minimally necessary number of investigators and attorneys to staff and supervise the new case

¹⁵⁵ *Id.* at 134.

teams. This will entail, at a minimum, the reinstatement of 15 sworn investigators and six HQE attorneys lost to recent budget constraints.

MBC Executive Director Thornton and HQE SAAG Ramirez report the following tentative plans for installation of the new case teams system:

(1) *Revised attorney and investigator assignments.* HQE and MBC envision the end of the DIDO program as it currently exists, and the replacement of it with a team of deputies attorney general assigned to each Medical Board district office. One of the deputies assigned to each location will be the team leader whose responsibilities will be similar, in some respects, to those of the previous DIDO attorney. The team leader and the district office supervisor (DOS) will work together to ensure that all incoming complaints that are reasonably expected to result in administrative action (a judgment call based on the combined knowledge and experience of the team leader and the DOS) are immediately assigned to an investigator and a prosecutor who will function as the investigative team and will handle the investigation and prosecution until completion of the matter.

(2) *Team leaders and case assignments.* The deputy attorney general assigned as team leader will be available as an advice and consultation deputy (ACD) on those matters that do not require input from the deputy assigned to the complaint(s). Additionally, incoming complaints that are not reasonably expected to result in administrative action will initially be assigned to an investigator and the ACD. However, if it appears at any point that the case may result in administrative action, it will then be reassigned to a trial deputy (preselected when the initial complaint assignment is made) who will participate on the investigative team.

(3) *Anticipated staffing challenges.* At the January 2006 outset, and before new personnel has arrived, HQE and MBC management must implement the new case assignment system with existing staff. HQE and MBC anticipate few problems with implementing the new assignments in northern California. Each HQE office in northern California currently works closely with only one Medical Board district office (MBC San Jose and HQE San Francisco, MBC Pleasant Hill and HQE Oakland, and MBC and HQE Sacramento). The only concern is with the Medical Board's Fresno office, where HQE staff will have to be augmented as there is currently only one deputy attorney general assigned there.

HQE and MBC management face a challenge in the Los Angeles metropolitan area. As noted above, HQE lost six Los Angeles DAGs in the recent hiring freeze, and currently has a number of additional attorney vacancies. As such, HQE does not currently have sufficient staff in its Los Angeles office to provide more than two deputies plus a team leader/ACD in each of the Medical Board's Los Angeles-area district offices. With current staffing levels in the Los Angeles HQE office, the team leader/ACD may have to cover two MBC district offices.

However, HQE management is working hard to fill the Los Angeles attorney vacancies, and plans are under way to seek approval for the reinstatement of the six Los Angeles office attorneys lost in the hiring freeze. The success of the vertical prosecution system will be tied closely to full staffing of both HQE and the MBC district offices.

■ ***Resolution of immediate and longer-term logistics issues.*** Immediate logistical issues should be addressed to implement vertical prosecution, including but not limited to issues relating to communications among team members, team meetings and related travel issues, and joint or separate use of shared equipment and information systems (such as management information systems, information database systems, computers, communications systems, and others).

In the longer term, HQE and MBC management must plan to address office space issues (including present and future office leases) and other co-location logistics which must be resolved if the proposed transfer of MBC investigators to HQE is ultimately approved.

■ ***Development of joint operations protocols and an operations manual.*** Operational protocols and procedures must be worked out jointly by the management staffs of MBC and HQE right away, well in advance of the January 2006 implementation date. The Monitor believes that these protocols must be ultimately reduced to a single jointly-produced operations manual, equivalent in relevant respects to MBC's current *Enforcement Operations Manual*. Ultimately, few activities will have greater impact on the success of this new system — and on the acceptance of the new system by all concerned — than the work of HQE and MBC colleagues in developing this joint operations manual.

MBC and HQE senior managers have been meeting on an ongoing basis to develop the necessary joint procedures. In order to ensure that each member of the investigative team, the trial attorney, the ACD, and the DOS understand their respective roles in the investigative process, HQE and MBC managers are now discussing and drafting joint operating protocols.

HQE and MBC executives intend the system protocols to clearly define the role and responsibilities of each team member and supervisor, always keeping in mind the ultimate goal of a quality investigation. MBC and HQE plan to have drafted the operational protocols by November 2005, well in advance of the January 1, 2006 implementation date, permitting senior management from both agencies to meet to discuss and finalize the procedural protocols before they are distributed. MBC and HQE managers have expressed support for the concept of a single joint operations manual to be drafted and distributed in the near future as the continuing guide for the new joint investigation/prosecution process.

■ ***Training of staffs in the vertical prosecution system; provisions for ongoing training.*** Implementation of a new operating system in a short timeframe requires immediate arrangements

for adequate retraining of existing staff in the new process. And ongoing training is vital for organizations dealing with complex issues such as those involved in highly technical regulatory activities.

To accomplish this task, and as soon as the basic operational protocols are developed and approved by MBC and HQE, the agencies will hold joint meetings of all MBC investigators and supervisors, and all deputies and supervising deputies, to provide orientation and training in the new vertical prosecution system. MBC and HQE report that training sessions are planned in San Diego, Los Angeles, and Oakland during the first two weeks of December. MBC managers and HQE executives have expressed independent commitment to an ongoing program of investigator and attorney training, conducted jointly and separately as appropriate.

■ ***Integration of management information systems.*** The present system features two unrelated management information systems (MIS) — DCA’s antiquated CAS system used by MBC and the relatively new ProLaw system at HQE — neither of which has the capacity to interact with the other. A jointly operated management information system is essential to the effective management and case tracking for the new vertical prosecution system. The Monitor recommends that MBC acquire appropriate licenses for the proprietary ProLaw system and use that platform to develop a unified management data system. MBC is actively inquiring into that solution now. A unified MIS will also be important in the evaluation of the new teamwork system for purposes of continuous improvement and to meet the oversight requirements of the July 2007 report.

■ ***Development of a process for ongoing evaluation and system improvements.*** MBC and HQE should work together early in the transitional process to establish a set of standards for the evaluation of the new vertical prosecution system, and a mechanism for self-evaluation and course correction during the implementation of the system. The Monitor recommends that a standing committee or working group of MBC and HQE senior managers, attorneys, and investigators be formed to identify transitional problems, agree on process improvements, and assist with the July 2007 program evaluation. Evaluation standards of both a qualitative and quantitative nature should be identified for use in internal process critiques and the July 2007 report.

■ ***Preparation of the July 2007 report to assist the required legislative evaluation.*** SB 231 mandates that MBC — in consultation with the Department of Justice, the Department of Consumer Affairs, the Department of Finance, and the Department of Personnel Administration — prepare and submit to the Legislature a report and recommendations on the vertical prosecution model by July 1, 2007.¹⁵⁶ As indicated immediately above, the Monitor recommends that MBC and HQE work together to identify qualitative and quantitative standards and to gather results to allow for a full and

¹⁵⁶ Gov’t Code § 12529.7, as added by SB 231 (Figueroa), 2005 Cal. Stat. 674, § 29.

fair evaluation of the new system. To the extent that vertical prosecution has succeeded in its initial application, and the Monitor is confident that it will, then the July 2007 report must demonstrate this success in measurable ways.

The drafting of the July 2007 report essentially starts now. By developing evaluative criteria and setting up systems to capture needed data, MBC and HQE will put in place the process necessary to provide a meaningful analysis of the impact of vertical prosecution in the July 2007 report.

■ ***Full integration of investigator and attorney staffs in the long term.*** The initial implementation of vertical prosecution under SB 231 poses a challenge because it does not take place in an environment of full staff integration. Although many of the benefits of vertical prosecution can and will be obtained through the initial phase of the SB 231 process, there remain significant advantages to the full integration of these personnel in a single agency, which can be accomplished most directly by transfer of the MBC investigators and their supervisors to HQE. Co-location of all staff within one agency, and each individual team within one office, would facilitate direct communications and joint work, greatly ease the process of mutual policymaking and training, and improve the rapport and sense of team among the involved staff. A single, simplified management structure — whether it uses a fully unified supervisory system or a dual system for attorneys and investigators — would make every decision and every task of implementation easier and quicker.

As they set up their new vertical prosecution system, HQE and MBC face unique circumstances which will shape the supervisory framework of that system, and these cannot be fully anticipated at this stage of the process. In the long term, the agencies may choose to adopt a single unified supervisory process, with appropriate accommodation of the differing staff categories, or they may choose to maintain separate supervisory chains for the different classes of professionals (leading ultimately to senior management within the Attorney General's Office), or some other variation on these themes. New Government Code section 12529.6 specifies that the investigators work "under the direction of the deputy attorney general" handling the matter, but leaves the issue of other supervisory functions to be determined by the agencies.

Whichever system HQE and MBC adopt, a number of important supervisory functions for investigative staff remain. During the initial phase of vertical prosecution, and even after the proposed transfer, the investigators of MBC will continue to need supervisors and managers to perform critical functions, including but not limited to investigator recruitment and training, case assignments, guidance on specialized technical or procedural issues (such as how to conduct complex interviews, undercover operations, search warrant preparation, etc.), investigator performance evaluation, discipline and promotion functions, budgetary and administrative functions, and establishment of investigator policies and procedures (and the drafting and constant revision of

operations manuals to implement them). Those functions must be clearly addressed in the supervisory process that the two agencies ultimately select.

The ultimate transfer of MBC's investigators and supervisors to HQE would have a dramatic impact on the salary, benefits, and career recognition for those investigators, as they would attain special agent status, yielding a minimum 5–7% pay increase and other benefits. The continuing morale, recruitment, and retention concerns described in the *Initial Report*¹⁵⁷ would be addressed in a single organizational change. Finding and keeping talented sworn investigators would become a much easier job.

MBC and HQE managers understand and agree with this perspective on the short- and long-term prospects for vertical prosecution. MBC and HQE executives share the view that implementation of vertical prosecution with investigators and prosecutors working in separate agencies is less than optimal and will entail challenges which full integration would have avoided. However, MBC and HQE management see the initial system as an important first phase of this process, whereby a basic version of vertical prosecution is put in place to demonstrate (on a limited basis) what could be accomplished on a larger scale with the full integration of the staffs through the transfer of the MBC investigators and their supervisors to HQE.

To facilitate the best possible working relationship between the agencies and to help address an aspect of change in organizational culture, authority for the settlement of MBC disciplinary cases would be shifted from enforcement program management to MBC's executive director and deputy executive director. Executive Director Thornton has implemented this measure to help eliminate the present perception of an attorney/client relationship, as opposed to the partnership intended in the Monitor's recommendations and by the Legislature in SB 231.

¹⁵⁷ *Id.* at 147–48.